

## REMARKS

This response is submitted in reply to the non-final Office Action dated August 8, 2007. No fee is due in connection with this Response. The Director is authorized to charge any fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 115808-330 on the account statement.

Claims 1-33 are pending in this application. Claims 1-33 are rejected under 35 U.S.C. §103. For at least the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claims 1-20 and 25-33 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,431,927 to Hand et al. (“Hand”) and EP 0645095 to Collings et al. (“Collings”) in view of U.S. Patent 6,025,004 to Speck et al. (“Speck”) and U.S. Patent No. 4,259,361 to Procter (“Procter”). Applicants respectfully disagree with and traverse this rejection for at least the reasons set forth below.

Independent Claims 1, 7, 18, 20, 25, 28 and 31 recite, in part, a dried pet food having an unstriated appearance, a density that ranges from about 16.8 lbs/ft<sup>3</sup> to about 20 lbs/ft<sup>3</sup>, and specified dimensions. In contrast, Applicants respectfully submit that the cited references fail to disclose each and every element of independent Claims 1, 13, 18, 21 and 28 and, moreover, that the cited references are not combinable.

Applicants respectfully submit that, even if the cited references are combinable, the cited references, either alone or in combination, fail to disclose each and every element of the present claims. For example, because neither *Hand*, *Collings*, nor *Procter* teaches the claimed density of an unstriated pet food product, the Patent Office cites to *Speck* as establishing that it was known in the art at the time the invention was made to adapt an extruder’s flow characteristics in order to control the density of kibble. See, Office Action, page 7, lines 20-26. However, even assuming that *Speck* discloses modifying an extruder’s flow characteristics to modify bulk density of an extrudate, *Speck* fails to disclose or suggest any density of a pet food product, let alone the density of an unstriated dried pet food, as required, in part, by the present claims.

Similarly, with respect to independent Claims 1 and 13, since neither *Hand* nor *Collings* teaches the width of the dried pet food as required, in part, by independent Claims 1 and 13, the Patent Office relies on *Procter* as disclosing kibbles “of a size not greater than about ½ inch

(average measurements in the three dimensions).” See, Office Action, page 8, lines 5-8 (emphasis added). The Patent Office further states that because Applicants dried pet food has, in part, a length of 0.59 inches, a width of 0.53 inches and a thickness of 0.47 inches, that Applicants’ claims conform to the disclosure of *Procter*. See, *Id.*, page 8, lines 8-12. However, Applicants respectfully disagree. For example, the disclosure of *Procter* indicates that the kibble may not be of a size greater than about ½ inch with an average measurement in three dimensions.

In contrast, the measurements of Applicants present claims cited by Patent Office average 0.53 inches in three dimension. Clearly, Applicants’ 0.53 inch kibble is greater than *Procter*’s “about ½ inch” kibble. Moreover, in a recent opinion, the Federal Circuit stated that the term “about” must be interpreted in its technological and stylistic context.” *Ortho-McNeil Pharmaceutical, Inc. v. Caraco Pharmaceutical Labs, Ltd.*, 476 F.3d 1321, 1326 (Fed. Cir. 2007). To properly interpret the term “about,” the Federal Circuit further stated that the use of the term in the patent specification, prosecution history, and claims should aid in determining how the inventor intended the term to be used. *Id.*

Taken in its “technological and stylistic context” in this case, the skilled artisan would recognize that *Procter* is directed toward a kibble size that is not greater than 0.50, accounting for slight variations either way. Therefore, in examining the specification and claims of *Procter*, the skilled artisan would recognize that the inventor intended the food product to include a kibble size of 0.50 inches and smaller.

Applicants also respectfully submit that there exists no reason why the skilled artisan would combine the cited references to arrive at the present claims. Moreover, references must be considered as a whole and those portions teaching against or away from the claimed invention must be considered. For example, Applicants respectfully submit that the Patent Office has failed to properly consider the previously submitted *Affidavit* submitted on February 1, 2006. The previous *Affidavit* showed that (1) the unstriated appearance and inner cellular structure resulting from a turbulent flow process significantly affects the performance of the claimed pet food as compared to other products of a striated appearance and (2) based on rheological and acoustic testing of the unstriated product of the present invention versus other striated products, these products are clearly different and present different functionalities in terms of dental plaque and tartar reduction. As a result, the skilled artisan would not find any reason to combine a striated pet food product with an unstriated pet food product in the absence of hindsight. For

example, *Collings* is directed toward an unstriated dog food product. *Hand*, by contrast, is directed toward an expanded, striated structural matrix, which teaches away from *Collings* and the product of the present invention.

*Hand* requires striations in its pet food for a specific purpose. For example, *Hand* teaches that his invention is directed to an extruded animal food product having an expanded, striated structural matrix which, when chewed by the animal, effectively removes tartar, stain and plaque on the animal's teeth through a mechanical cleansing action without causing gastrointestinal distress. When chewed, the striated product fractures along the striations whereby the animal's teeth are retained in increased abrasive contact with the fractured layers. The teeth are then mechanically cleaned by the surfaces of the separated layers as the product is chewed by the animal, and the time that the product is retained in mechanical cleaning contact with its teeth is increased. See, *Hand*, column 2, lines 26-39. As a result, the striations are an essential and functional feature of *Hand's* pet food and, thus, teach away from a combination with any unstriated pet food.

Applicants respectfully disagree with the Patent Office's assertion that "*Hand et al.* teach the conditions necessary to make both the unstriated and striated pet food product, but [it] exemplifies only the striated product." See, Office Action, page 5, lines 4-6. In contrast, Applicants respectfully submit that, at best, *Hand* distinguishes turbulent flow from laminar flow and emphasizes that the product in *Hand* is created using laminar flow conditions that result in a product with an expanded striated structural matrix. As such, *Hand* teaches away from unstriated food product such as the product in *Collings*. In fact, the Patent Office even admits that "[*Hand*] does not teach that its product is unstriated." See, Office Action, page 4, line 8.

In contrast, *Collings* is entirely directed toward a striated dog food product having improved resistance to breakage on shipping and handling. Drop tests performed on this extruded dog treat product resulted in unacceptable breakage rates and prompted the invention in *Collings*, which is directed to a process for manufacture of a dog treat product with strong structural integrity and resistance to breaking. See, *Collings*, page 2, lines 36-44. *Collings* states that when attempting to adapt the composition and process conditions of *Hand* (SN 07/889,534 at the time of filing *Collings*) to the manufacture of a dog treat food product, it was determined that the extruded product lacked the sufficient structural integrity to withstand the impacting internal pressure when the container holding the packaged dog treat product was dropped during

handling and use. See, *Collings*, page 2, lines 30-35. Therefore, *Collings* teaches away from the composition and process of *Hand*.

Applicants respectfully disagree with the Patent Office's assertion that "*Collings et al.* is closely related to *Hand et al.* in its disclosure" because "having adapted *Hands et al.*'s process (i.e., SN 07/889,534 now patent No 5431927), to obtain a product with no striations, *Collings et al.* is drawn to improving such a product's breakage rate." See, Office Action, page 11, line 17- page 12, line 3. To support this assertion, the Patent Office cites *Collings* as disclosing the following:

[w]hen it was attempted to adapt the composition and process conditions of SN 07/889,534 to the manufacture of a dog treat food product, that is, a product that was not in a stratified condition, it was determined that the extruded, expanded dog treat product did not have sufficient structural integrity to withstand breakage due to drop impact, i.e., the product could not satisfactorily withstand the impacting internal pressure when the container in which the dog treat product was packaged was dropped during handling and use.

See, Office Action, page 11, lines 19-26 (citing *Collings*, page 2, lines 30-35). However, in contrast, Applicants respectfully submit that this disclosure teaches away from the use of the composition and process of *Hand* to manufacture a dog treat food product. As specifically disclosed in *Collings*, the striated product "did not have sufficient structural integrity to withstand breakage due to drop impact." As such, Applicants respectfully submit that *Collings* teaches away from a combination with the composition and process of *Hand*.

Further, the process of *Collings* diverges from the initial *Hand* process by implementing wholly different post-extrusion processing steps based upon drying the extruded dog food products using, for example, different process parameters and equipment to acquire the structural integrity not accomplished using the *Hand* process. See, *Collings*, page 4, lines 1-26. Therefore, one of ordinary skill in the art should conclude that, in light of the preceding, *Collings* teaches away from the complete process in *Hand* as insufficient to meet the needs disclosed in *Collings*.

Moreover, *Collings* and *Hand* are directed to completely different objectives. While *Collings* is directed to manufacturing a dog treat product with strong structural integrity and resistance to breakage within packaging, *Hand* is directed to a pet food product that exhibits improved mechanical tooth cleansing function. Thus, while *Collings* is directed to transportation and distribution needs, *Hand* is directed to product functionality in a user's oral cavity. If the

proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims prima facie obvious. *In re Ratti*, 270 F.2d 810, 123 USPQ 349 (CCPA 1959). This certainly applies here where one of the cited references is directed to a product that is intended to be striated (*Hand*) and the other cited reference is directed to a food product intended to be unstriated (*Collings*).

*Procter* relates to ultra homogenization of an animal protein-containing material before the application of heat to the substance. The ultra homogenization of the protein-containing substance is used to reduce the costs of preserving, storing and transporting foods containing proteins. See, *Procter*, column 2, lines 1-8; column 1, lines 20-34. In contrast to the Patent Office's assertion that *Procter* is "wholly drawn to preparing dehydrated feedstuffs for animals (col 2, lines 43-45) in the form of kibbles," Applicants respectfully submit that *Procter* is directed toward processes for preparing foodstuffs for humans, feedstuffs for animals and animal derived plant fertilizers. See, *Procter*, column 2, lines 43-46. Therefore, because *Procter* is entirely directed toward ultra homogenization of protein-containing substances to reduce cost, *Procter* is entirely unconcerned with the extrusion of a pet food product that reduces tartar.

*Speck* is entirely directed toward a process for mechanically controlling the bulk density of an extruded material. See, *Speck*, Abstract. The disclosure of *Speck* relates to a process in which the bulk density of an extrudate extruded through the extruder is controlled by controlling the extent which the flow restriction element restricts the flow of material through the extruder. See, *Speck*, column 2, lines 50-53. *Speck* is entirely unconcerned with the extrusion of a pet food product that reduces tartar and does not even disclose or suggest that the extrudate may be a pet food product.

To support the combination and/or modification of the cited art to arrive at the claimed invention, the Patent Office has improperly applied hindsight reasoning by selectively piecing together teachings of each of the references in an attempt to recreate what the claimed invention discloses. Instead, the claims must be viewed as a whole as defined by the claimed invention and not dissected into discrete elements to be analyzed in isolation. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983); *In re Ochiai*, 71 F.3d 1565, 1572, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995). One should not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the

claimed invention. *In re Fine*, 837 F.2d at 1075. (Fed. Cir. 1988). As such, Applicants respectfully submit that the skilled artisan would have no reason to combine the cited references to arrive at the present claims.

For the reasons discussed above, Applicants respectfully submit that Claims 1, 7, 18, 20, 25, 28 and 31 and Claims 2-6, 8-17, 19, 26-27, 29-30 and 32-33 that depend from these claims are novel, nonobvious and distinguishable from the cited reference.

Accordingly, Applicants respectfully request that the rejection of Claims 1-20 and 25-33 under 35 U.S.C. §103(a) be withdrawn.

In the Office Action, Claims 21-24 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,431,927 to Hand et al. ("Hand") and EP 0645095 to Collings et al. ("*Collings*") in view of U.S. Patent 6,025,004 to Speck et al. ("*Speck*") and U.S. Patent No. 4,259,361 to Procter ("*Procter*") and further in view of U.S. Patent No. 5,000,490 to Staples et al. ("*Staples*") or U.S. Patent No. 5,407,661 to Simone et al. ("*Simone*"). Applicants respectfully disagree with and traverse this rejection for at least the reasons set forth below.

Independent Claim 21 recites, in part, a dried pet food having a first sized kibble and second sized kibble, the first sized kibble being larger than the second, at least one kibble having an unstriated appearance and a density that ranges from about 16.8 lbs/ft<sup>3</sup> to about 20 lbs/ft<sup>3</sup>. The unstriated product (versus striated) of the present invention, which stems from turbulent rather than laminar flow extrusion, results in a dried pet food having a cellular structure that includes microscopic air pockets. See, specification, page 8, lines 17-24. Because of the microscopic air pockets of this unstriated dried pet food, the inner surface will have a fine, sandpaper-like appearance and a dense, foam-like structure that is in contrast to a laminar-like structure. See, specification, page 8, lines 25-30. This cellular structure improves the tartar reducing properties of the product by applying a mechanical scraping action to the teeth. See, specification, page 8 line 30 – page 9 line 15. In contrast, Applicants respectfully submit that, even assuming that there exists a reason for the skilled artisan to combine the cited references, the cited references are deficient with respect to Claims 21-24.

For example, the cited references fail to disclose a pet food comprising at least two different sized kibbles including a first sized kibble and a second sized kibble wherein the first sized kibble is larger in size than the second sized kibble, wherein the first sized kibble and the second sized kibble are present in a ratio of approximately 20 to about 80% to approximately 80

to about 20% as required, in part, by independent Claim 21. For example, *Hand* discloses a finished product where a uniform extruded strand is cut into thick disc-shaped pellets of the same length. See, *Hand*, column 8, lines 12-17. Similarly, *Collings* discloses a uniform extruded strand cut into equally thick wavy-shaped chips. See, *Collings*, page 6, lines 1-4.

For the reasons discussed above, Applicants respectfully submit that Claim 21 and Claims 22-24 that depend from independent Claim 21 are novel, nonobvious and distinguishable from the cited reference.

Accordingly, Applicants respectfully request that the rejection of Claims 21-24 under 35 U.S.C. §103(a) be withdrawn.

For at least the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

BELL, BOYD & LLOYD LLC

BY 

Robert M. Barrett  
Reg. No. 30,142  
Customer No. 29157

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